IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR

J U D G M E N T

Ladu Ram Vs. The State of Rajasthan

S.B.CRIMINAL APPEAL NO.87/1988
against the judgment dt.27.1.1988 passed by
the Addl.Distt.& Sessions Judge, Barmer,
in Sessions Case No.60/1987.

Date of Judgment: July 13, 2007

P R E S E N T

HON'BLE MR.JUSTICE DEO NARAYAN THANVI

Mr.Doongar Singh, for the appellant.
Mr.V.R.Mehta, Public Prosecutor.

REPORTABLE BY THE COURT:

1. This appeal is directed against the judgment of the learned Additional District & Sessions Judge, Barmer, dated 27.1.1988, whereby he convicted the accused appellant Ladu Ram for the offence under Section 18 of the Narcotic Drugs & Psychotropic Substances Act, 1985, (hereinafter referred-to as "the Act") and sentenced him to ten years' rigorous imprisonment and to pay a fine of Rs.one lac and in default, to further undergo one year's

R.I.

2. The allegation against the accused Ladu Ram was that 150 gms of opium was recovered from his Dhani at Village Uparla, Tehsil Chohtan, District Barmer on 29.7.1986 by Deputy S.P., Chohtan and his party including the S.H.O., Chohtan. Out of 150 gms. of opium, a sample of 30 gms. was taken, which was sent for chemical examination. Thereafter, the accused was chargesheeted. Learned trial Judge framed the charge under Section 18 of the Act, to which he pleaded not guilty. The prosecution examined 8 witnesses. The statement of accused under Section 313 CrPC was recorded. After hearing, the learned trial Judge has sentenced him as above.

3. While assailing the judgment of the learned trial Judge, Mr.Doongar Singh, appearing on behalf of the appellant, has vehemently argued that this is a fake case of recovery and all the documents including the recovery memo, have been forged. He has strongly contended that the place of recovery itself is doubtful and the sample of 30 gms. of opium, which is said to have been analyzed, was not sent for chemical examination. Not only the motbirs are hostile but their statements recorded under Section 161 CrPC have been contradicted in toto. There were many witnesses present on the spot but they were not

examined and the main signatory of the recovery memo under whose supervision, the recovery has been made, has neither been examined nor cited as a witness in the case, who was an officer of the gazetted rank. According to him, specimen seal was also not in accordance with the provisions of Section 55 of the Act, apart from the non-compliance of other provisions of the Act.

4. On the contrary, learned Public Prosecutor has supported the judgment of the learned trial court.

5. In this case, the most important aspect as pointed out by the learned counsel is the entry in the Rojnamcha report Ex.P.10, which says about keeping of opium by the accused appellant in his Dhani at Village Uparla. This is said to be an information given by A.S.I. Shiv Chand to S.H.O. Banne Dan, who, without obtaining warrant of search as required under Section 57 of the Act, drew a memo Ex.P.11 and went on the spot by taking C.O., Chohtan alongwith Head Constable Goma Ram, Constables Chutra Ram, Chuna Ram and Kan singh and driver Khushal Chand on jeep No.RJC 2325. Thereafter, the seizure memo Ex.P.4 of opium containing 150 gms. was prepared and it was signed by Dy.S.P. Chohtan, S.H.O. Police Station Chohtan, Kalu Ram, ASI Shiv Chand, Ram Chander and

Goma Ram. The memo is not signed by Chutra Ram, Chuna Ram, Kan Singh and Driver Khushal Chand, who are said to have accompanied the seizing party. Neither these four witnesses have been examined by the prosecution nor Kalu Ram (PW 7), who signed the memo, has proved it. The motbirs of recovery viz; Ram Chander alias Malla Ram (PW 6) and Kalu Ram (PW 7) are the hostile witnesses. Now remains the evidence of three police personnels viz; Head Constable Goma Ram (PW 3), ASI Shiv Chand (PW 4) and SHO Banne Dan (PW 8).

6. Head Constable Goma Ram (PW 3) and ASI Shiv Chand (PW 4) have nowhere said that C.O. (Dy.S.P.) Punjraj Singh was with them during the time of raid. No question in this regard has been put to them, whereas SHO Banne Dan (PW 8) has said that C.O. was with him but the C.O. has not been produced in the evidence. When the Circle Officer, who is of gazetted rank has not been examined with regard to receiving information or giving authorization as required under Sections 41 and 42 of the Act, which are of mandatory nature, the whole search is illegal. It further strengthens from the fact narrated by the SHO Banne dan (PW 8) in his statement that the search was made by himself and Shiv Chand in the presence of motbirs by giving their "jamatalashi". In the absence of non-examination of the C.O., whether any report was submitted about the arrest and

seizure to the superior officer within 48 hours, has also not been proved by the SHO Banne Dan (PW 8) neither in his statement nor through any document. This non-submission of report is fatal under Section 57 of the Act.

7. Another point raised by the learned counsel for the appellant is about the place of recovery which according to the prosecution witnesses is Ex.D.1 at place `A' - a hut. This was prepared by the S.H.O. on the basis of the certificate issued by Sarpanch, Gram Panchayat, Dhok vide Ex.P.6. The Sarpanch Mobta Ram (PW 5) has stated in his examination-in-chief that he issued certificate Ex.P.6 but in his cross examination, he has stated that site plan Ex.D.1 was not of the `dhani' of accused Ladu Ram. When he was re-examined on this point, he further clarified that he said so because neither all huts nor rooms were shown in the plan. This witness is not a hostile one. When the place of recovery is said to be doubtful, it further fortifies the contention of the learned counsel for the appellant that the recovery has been made to falsely implicate the accused.

8. Learned counsel for the appellant has also pointed out certain contradictions from the statement of Malla Ram (PW 6) with his version in Ex.P.8 and that of Kalu Ram (PW 7) with his version in Ex.P.9 who have been asked in verbatim from the

portion `A to B' and `C to D'. I have gone through the statements of these two witnesses, who are motbirs of the case and from their statements recorded under Section 161 CrPC vide Ex.P.8 and 9 respectively, it appears that whole of the statements have been incorporated while asking the questions to these two witnesses. This procedure adopted by the learned trial Judge cannot be said to be in conformity with law laid down under Section 145 of the Indian Evidence Act read with proviso to Section 162(1) Cr.P.C. Section 145 of the Evidence Act permits cross examination as to previous statement in writing but it must be relevant to matters in question without such writing being shown to him or being proved but if it is intended to contadict him by writing, his attention must be drawn to those parts of the writing which are to be used for contradicting him. His previous statement was not a document but a statement recorded under Section 161 CrPC. At the most, the Court can show the previous statement or read it before him for the purpose of drawing his attention. Normally, the statement recorded under Sec.161 CrPC are unsigned statements and portion thereof can be used for the purpose of contradiction. Recording the whole of the statement in the cross examination cannot be said to be a sound vision in interpreting Section 145 of the Evidence Act read with provision to Section 162(1) CrPC because this proviso also says that when a witness is called by

the prosecution during trial, any part of his statement, if duly proved, may be used by the accused and with the permission of the Court by the prosecution to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act.

9. The last argument of the learned counsel for the appellant is with regard to sending of sample for chemical examination. The prosecution has come out with a case that 150 gms. of opium was recovered, out of which 30 gms. was taken for sample. As per the report of the F.S.L. Ex.P.15, the sample was of 27 gms., the seals were intact and it was of opium having 1.38% morphine. The sample is said to have been taken of 30 gms. Though this difference of 3 gms. may occur due to moisture or weight of polythene bag, which normally should not come because of the nature of opium being of solid substance but if this fact is looked into in the light of the statement of SHO Banne Dan (PW 8) in which he has stated in the last line of the examination-in-chief that recovered opium is `Article-1', sample is `Article-2' and lock & key is `Article-3', which he has identified in the Court. When the sample `Article-2', which is said to be of 30 gms., has been identified in the Court then which sample and of what quantity was sent for chemical examination, creates heavy suspicion and the evidence of Mangilal that he received the sample from Shera Ram vide Ex.P.2 and the statement of

Goma Ram that he deposited the sample in the Malkhana and sent it for chemical examination with Shera Ram creates heavy doubt because Goma Ram is the incharge of the Malkhana, who deposited the Malkhana articles with him and also went with the raiding party. Thus, the contention of the learned counsel with regard to non-compliance of Sections 41, 42, 50, 55 and 57 in the present case is full of force and the recovery of opium right from the information till the chemical examination, creates heavy doubt on the truthfulness of the investigation. Learned trial Judge has not elaborately discussed these aspects in his judgment and the learned Public Prosecutor has not been able to satisfactorily reply the infirmities and doubts created by the prosecution, which lead to no other conclusion except the innocence of the accused.

10. Consequently, this appeal is allowed. The judgment of the learned Additional District & Sessions Judge, Barmer, dated 27.1.1988 convicting the accused appellant Ladu Ram for the offence under Section 18 of the Act with ten years' rigorous imprisonment and a fine of Rs.one lac, is set aside. Appellant

Ladu Ram is acquitted for the charge levelled against him. He is on bail, his bail bonds stand cancelled.

(DEO NARAYAN THANVI), J.

RANKAWAT JK, PS